

MICHAEL A. VITALE
mav@hcmllp.com

HERZOG, CREBS & MCGHEE, LLP
ATTORNEYS AT LAW
ONE CITY CENTRE - 24th FLOOR
515 NORTH SIXTH STREET
ST. LOUIS, MISSOURI 63101-2409
(314) 231-6700
FAX (314) 231-4656

ILLINOIS OFFICE
5111 WEST MAIN
BELLEVILLE, ILLINOIS 62226-4797
(618) 235-7656

May 1, 2002

Via Federal Express

Mr. Dale Hardy Roberts
Secretary/Chief Regulatory Law Judge
Missouri Public Service Commission
200 Madison Street, Suite 100
Jefferson City, Missouri 65101

Re: MPSC Case No. EC-2002-112

Dear Mr. Roberts:

Enclosed you will find an original and nine copies of the respondent AmerenUE's Objections to and Motion to Strike Hearsay Contained in Affidavit Direct Testimony Filed by Complainants.

Please file the original and eight copies of this pleading with the Commission and return the extra copy file-stamped to me in the enclosed self-addressed stamped envelope.

If anything further is needed to file this pleading, please let me know.

Yours very truly,

HERZOG, CREBS & MCGHEE, LLP



Michael A. Vitale

MAV/mh
Enclosures
cc: Freeman R. Bosley, Jr.
Steve Dottheim
John B. Coffman

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

STERLING MOODY, STERLING'S MARKET
PLACE AND STERLING'S PLACE, I,

Complainants,

v.

AMERENUE, UNION ELECTRIC CO. d/b/a
AMERENUE, and MIKE FOY, LEROY ETTLING,
and SHERRY MOSCHNER, as employees of
AmerenUE,

Respondents.

Case No. EC-2002-112

**OBJECTIONS TO AND MOTION TO STRIKE HEARSAY CONTAINED
IN AFFIDAVIT DIRECT TESTIMONY FILED BY COMPLAINANTS**

Come now respondents, and for their Objections to and Motion to Strike Hearsay
Contained in Affidavit Direct Testimony Filed by Complainants, state as follows

1. Section 536.070(12) RSMo provides in pertinent part that:

"Any party...desiring to introduce an affidavit in evidence at a hearing in a contested case may serve on all other parties...copies of such affidavit...at any time before the hearing or at such later time as may be stipulated. Not later than seven days after such service...any other party...may serve on the party...who served such affidavit an objection to the use of the affidavit or some designated portion thereof on the ground that it is in the form of an affidavit....Failure to serve an objection...based on the ground aforesaid shall constitute a waiver of all objections to the introduction of such affidavit, or of the parts thereof with respect to which no such objection was served **on the grounds....that it constitutes or contains hearsay evidence.**" (emphasis added)

2. Although technical rules of evidence are not controlling in administrative hearings, the prohibition against the use of hearsay evidence is a fundamental rule of evidence and hearsay evidence and conclusions based upon hearsay do not satisfy the "competent and substantial evidence upon the whole record" requirement essential to

the validity of a final decision of an administrative body. State ex rel. Bond v. Simmons, 299 S.W. 2d 540 (Mo. App. 1957).

3. 4 CSR 240-2.130(1) applies the rules of evidence contained in Section 536.070 to contested case proceedings before the Missouri Public Service Commission.

4. Respondents object to the following portions of Complainants' Direct Testimony on the grounds that the testimony is in the form of an affidavit, constitutes inadmissible hearsay evidence and should be stricken if and when offered into evidence in the case:

Direct Testimony of Sterling Moody

- A. "Burt Schoenlau told me that the electric bills for the grocery store included usage for other stores on the mall." P. 3, lines 5-6.
- B. "They found that Sterling's Market Place was being billed for service that was being provided to several other stores on the premises." P. 3, lines 15-16.
- C. "Yes. Mr. Dennis Rodiemier with the State Department of Economic Development contacted Ameren to let them know that the State was working on funding for Sterling Market Place to help with financial assistance." P. 8, lines 8-10.
- D. "State Representative Louis Ford contacted Mike Foy on our behalf in an effort to get the power restored. Congressman William L. Clay, Jr. also contacted Mike Foy in an effort to get the power restored. Ms. Julie Gibson, Chief of Staff to Governor Bob Holden contacted Mike Foy in an effort to get the power restored. Former State Senator J. B. Jet Banks contacted Mike Foy in an effort to get the power restored. Joe Driscoll, Director of the Department of Economic Development contacted Mike Foy in an effort to get the service restored. Mr. Harold Crumpton, Senior Vice President of the NAACP contacted Mike Foy in an effort to get the service restored." P. 8, lines 16-23.
- E. "Mike Foy told each of these individuals that Sterling's Market Place owed Two Hundred Sixty Five Thousand Dollars and that this was the amount needed to get the service on." P. 9, lines 2-4.

- F. "On or about May 8th, Senator Jet Banks contacted me and said that Mike Foy contacted him and said that he would cut the power on for a \$25,000 deposit." P. 9, lines 7-8.
- G. "Mr. Schoenlau called Mr. Ettling to have the service turned on in his name and Ettling told him who to call." P. 9, lines 16-17.
- H. "Yes, I had Mr. Mark Kasen deliver two cashier checks and one bank check totaling \$45,000 to Mr. Ettling and got a receipt on with the understanding that the electrical service would be restored by 3:00 p.m. on May 15, 2001." P. 9, lines 19-21.
- I. "On or about May 15, 2001, Mr. McNamara contacted Sherry Moschner, Manager, Customer Service, to request a meeting to discuss what steps were necessary to get the electric service restored and to guarantee the checks." P. 10, lines 5-8.
- J. "The agreement set the disputed indebtedness at \$89,000.00 instead of \$265,000.00. Of the \$45,000.00 originally demanded by Ameren for the deposit, Ameren applied \$36,000.00 to the common area account and applied \$9,000.00 towards the deposit." P. 10, lines 21-23.

Direct Testimony of Brian McNamara

- K. "Sterling Moody would tell me on several occasions that he was being contacted by Mr. Leroy Ettling at Ameren about making payments on the electric bill. On one occasion, Sterling Moody told me that he had made arrangements to pay two thousand dollars on the bill." P. 2, lines 9-12.
- L. "On April 17, 2001, Sterling Moody contacted me and told me that an employee from AmerenUE was there to shut the electricity off. He also told me that he had contacted Mr. Mike Foy about making arrangements to keep the service on and Foy demanded Two Hundred Sixty Five Thousand Dollars or the service would be shut off." P. 2, lines 15-18.
- M. "Sterling Moody came to the bank with Twenty Five Thousand Dollars to secure a cashier's check which he said Ameren was requesting for a deposit. When Foy was contacted to let him know that Sterling Moody had the Twenty Five Thousand Dollars cashier's check, he demanded \$45,000.00. One week later Sterling raised the \$45,000.00 and made arrangements to take it to Ameren. After the \$45,000.00 was delivered to Ameren, Sterling called me and said he was given a receipt and that the service would be turned on the next day by 3:30 p.m. The next day Sterling Moody called and told me that Ameren refused to turn the service on until the cashier's checks cleared." P. 3, lines 7-14.

- N. "Sterling disputed the bills ... " P. 3, line 23.
- O. "It worsened Sterling's Market Place I's relationship with his creditors and potential investors. It damaged his sales volume and customer base lost its faith in the grocery store. Sterling's Market Place I never recovered." P. 4, line 23 to P. 5, lines 1-2.

Direct Testimony of Louis Biernbaum

- P. "Sometimes I would be asked by Sterling Moody to take payments to Mr. Ettling to the AmerenUE corporate headquarters on Chouteau prior to the first termination on April 10, 2001." P. 2, lines 14-16.
- Q. "Sterling immediately began trying to contact Mr. Ettling ..." P. 3, lines 1-2.
- R. "Sterling Moody started calling to the main office to try to work something out" P. 3, lines 6-7.

WHEREFORE, respondents object to the hearsay testimony set forth in paragraph 4 herein and respectfully moves that such testimony be stricken from the Direct Testimony of Complainants when and if such testimony is offered into evidence into evidence in this proceeding.

HERZOG, CREBS & McGHEE, LLP

By:


Michael A. Vitale MBE #30008
James D. Maschhoff MBE #
One City Centre, 24th Floor
515 North Sixth Street
St. Louis, Missouri 63101
(314) 231-6700 – Telephone
(314) 231-4656 – Facsimile
mav@hcmlp.com - E-mail

and

James J. Cook MBE #22697
Managing Associate General Counsel
Ameren Services Company
One Ameren Plaza
1901 Chouteau Avenue
P.O. Box 66149 (MC 1310)
St. Louis, Missouri 63166-6149
(314) 554-2237 – Telephone
(314) 554-4014 - Facsimile

Attorneys for Respondents AmerenUE,
Union Electric Co d/b/a AmerenUE,
Mike Foy, Leroy Ettling and Sherry
Moschner

Certificate of Service

The undersigned hereby certifies that a copy of Respondent AmerenUE's Objections and Motion to Strike Hearsay Contained in Affidavit Direct Testimony Filed by Complainant was sent by first class mail postage prepaid this 2nd day of May 2002 to John B. Coffman, Office of Public Counsel, P.O. Box 7800, Jefferson City, Missouri 65102, Steve Dottheim, Office of General Counsel, Missouri Public Service Commission, P.O. Box 360, Jefferson City, Missouri 65102 and hand-delivered on the 2nd day of May 2002 to Freeman Bosley, Jr., 1601 Olive Street, First Floor, St. Louis, Missouri 63103-2344, attorney for complainants.

